Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-860

RALPH TROPIANO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Ralph Tropiano, respectfully prays that a writ of certiorari issue to review the judgment, without opinion, of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 4, 1971.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on October 4, 1971. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Does the refusal of counsel for a co-defendant to permit him to testify at trial in exculpation of Petitioner, deny Petitioner his Sixth Amendment right to due process?

2. Does such testimony, when presented subsequent to Petitioner's conviction, constitute "newly discovered evidence."

Statutory Provisions Involved

UNITED STATES CODE, TITLE 18

§ 1951. *Interference with commerce by threats or violence*

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by

wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory or Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Statement of the Case

Petitioner was convicted by a jury on November 15, 1968, after an 18 day trial, of extortion by the wrongful use of threatened force, violence and fear, in violation of the Hobbs Anti-Racketeering Act, 18 U.S.C. § 1951 (1064), and of conspiracy to do so. He was sentenced on December 9, 1968 to concurrent 12 year terms of imprisonment and was ordered to pay a $10,000 committed fine within 30 days. The judgment of conviction was affirmed by the Court of Appeals for the Second Circuit on November 29, 1969, 418 F.2d 1069 (SRW, PRH, JRB,). Certiorari was denied on April 6, 1970, 397 U.S. 1021. On July 29, 1971 Petitioner's motion to reduce sentence was denied.

On November 30, 1970 Petitioner filed a motion to vacate judgment and sentence before the trial court. By memorandum of decision and order dated February 26, 1971 that court denied Petitioner's motion to vacate sentence. Peti-

tioner's motion and the court's memorandum are reflected in the Appendix commencing on page 9.

Petitioner was represented throughout proceedings in the District Court by retained counsel, Howard A. Jacobs, Esq. Petitioner's co-defendant Grasso was represented by retained counsel Ira B. Grudberg, Esq. Attorneys Jacobs and Grudberg were members of the New Haven law firm of Jacobs, Jacobs, Grudberg & Clifford. During the trial, Grasso informed his attorney, Grudberg, that he wished to testify that Tropiano "never threatened Mr. Caron or anyone else at any time." Grudberg instructed Grasso not to testify and he did not take the witness stand.

On October 4, 1971 the Court below affirmed the opinion and order of the United States District Court for the District of Connecticut.

Reasons for Granting the Writ

I. The Refusal of Counsel for a Co-Defendant to Permit Him to Testify at Trial in Exculpation of Petitioner, Does Deny Petitioner his Sixth Amendment Right to Due Process.

The basic purpose of trial is the determination of truth and every accused must enjoy the right to have assistance of counsel for his defense. *Stovall* v. *Denno*, 388 U.S. 293; 87 S. Ct. 1967, 18 L. Ed. 2d 1199; *U.S.* v. *Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149.

Defendants are entitled to meaningful representation by counsel without any possibility of conflict of interest present between any two or two or more defendants. *Kaplan* v. *United States*, 375 F.2d 895, Cert. Denied 389 U.S. 839, 88 S. Ct. 67, 19 L. Ed. 2d 103.

Some prejudice or conflict of interest may exist as a result of joint representation of multiple defendants by one counsel. *Lollar* v. *U. S.*, 376 F.2d 243 (C.A.D.C. 1967).

In the instant case, Petitioner was defended by Howard A. Jacobs, Esq. of New Haven, Connecticut, while co-defendant Grasso was represented by Ira B. Grudberg of the same firm. During the trial co-defendant Grasso consistently requested of his attorney the opportunity to testify to the fact that Petitioner had never threatened Caron (Respondent's chief witness) or anyone else. Grasso made known to his attorney during trial his desire to so testify but was repeatedly prevented from so doing by the advice of his counsel. Petitioner was not made aware of this fact until subsequent to conviction and is unaware as to whether Grasso's desire to testify was made known to Petitioner's attorney and why Grasso was not allowed to present evidence tending to exonerate the Petitioner.

It is respectfully submitted that the circumstances of Petitioner and Grasso being represented by counsel associated in the same law firm, Grasso's desire to testify so as to exonerate Petitioner, and the fact that this desire of Petitioner's co-defendant was not made known to him prior to conviction constitutes a denial of the effective assistance of counsel entitling Petitioner to the prayed for relief.

II. Such Testimony, When Presented Subsequent to Petitioner's Conviction, Does Constitute "Newly Discovered Evidence."

On a motion based upon newly discovered evidence, the evidence and credibility of the witnesses must be weighed and if it be determined that the verdict is contrary to the weight of the evidence or that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted. *U.S.* v. *Hurley*, 281 F. Supp. 443 (D.C. Conn. 1968).

For a new trial to be granted on the ground of newly discovered evidence, the evidence must be more than im-

peaching or cumulative, and must be material to the issues involved and must be such as would probably produce an acquittal. *U.S.* v. *Gleeson*, 411 F.2d 1091 (C.A. Kan. 1969). To constitute newly discovered evidence for which a new trial be granted, the evidence must pertain to facts in existence at time of trial and not to facts that have occurred subsequently. *U.S.* v. *DePugh*, 266 F. Supp. 417 (D.C. Mo. 1967).

It is well settled that before a sentence may be vacated and a new trial granted on the ground of newly discovered evidence the following criteria must be satisfied:

1. The evidence must be, in fact, newly discovered.
2. The facts must be alleged from which the court can infer diligence on the part of the defendant.
3. The evidence relied on must not be merely cumulative or impeaching.
4. It must be material to the issues involved.
5. It must be such and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal. *U.S.* v. *Bradwell*, 295 F. Supp. 958 (U. S.D.C. Conn. 1968).

Petitioner submits that criteria 1 and 2 have been met in that Petitioner was not made aware of the refusal of co-defendant Grasso's attorney to permit him to testify until subsequent conviction. Moreover, the evidence which Grasso now wishes to present is neither cumulative or impeaching. Although other witnesses testified at trial, the weight of which testimony was to impeach Caron's testimony. The difference between the testimony of a co-defendant as distinguished from that of a defense witness must be noted. Surely the jury would have afforded greater weight to the testimony of Grasso than to other non-accused witnesses. It may be fairly said that had Grasso been permitted to testify as to the lack of threats on the part of Petitioner towards Caron, an acquittal would

have resulted with regard to your appellant. Testimony of a co-defendant may be presumed to be more influencial in a fact finding process than testimony of a defense witness. Moreover, no degree of exercise of due diligence on the part of Petitioner could have effectuated the production of this evidence at trial since Grasso's surpressed desire was not made known until after conviction.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

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APPENDIX

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

TITLE OF CASE

RALPH "WHITEY" TROPIANO

v.

UNITED STATES OF AMERICA

1970		
Nov.	30	Motion to Vacate Judgment and Sentence, filed.
1971		
Feb.	26	Order endorsed on Motion to Vacte Judgment and Sentence, as follows: "Motion denied. See separate Memorandum of Decision filed today." Timbers, J. M-3/1/71 Copies mailed to all counsel and handed U.S. Attorney.
	26	Memorandum of Decision on Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 (1964), entered. Petitioner Tropiano's motion to vacate sentence is denied in all respects. Timbers, J. Copies mailed from Bridgeport to Attorneys Bailey, Alch, LaSala and to U.S. Attorney. M-3/1/71.
Mar.	1	Judgment entered in favor of respondent, dismissing the motion to vacate judgment. Earl, C. M-3/1/71 Copies mailed to all counsel; handed U.S. Attorney.
Mar.	8	Notice of Appeal, filed by Petitioner. Copies mailed to all counsel. Copy of Notice and of Docket Entries mailed to U.S. Court of Appeals.
Mar.	23	Designation of Record on Appeal, filed by Plaintiff.

MOTION TO VACATE JUDGMENT AND SENTENCE

[Filed Nov. 30, 1970]

Now comes Defendant Tropiano in the above-captioned matter and, pursuant to the provisions of Title 28, Section 2255 U.S.C., moves this Honorable Court to vacate the judgment and sentence heretofore imposed upon the ground that said Defendant was denied the "assistance of counsel" guaranteed by the Sixth Amendment to the United States Constitution; that he was denied his constitutional right to due process of law guaranteed by the Fifth Amendment to the United States Constitution; and that said Defendant has come upon newly discovered evidence which, under the circumstances, attending his trial and conviction, was not made known to him, despite his diligence, and which evidence, had it been presented, would not have been merely cumulative or impeaching but would have been material and probably produced a different result.

The facts upon which this motion is based may be stated as follows:

Co-defendant Grasso was represented by Ira B. Grudberg, Esquire of New Haven, Connecticut. Your movant was defended by Howard A. Jacobs, Esquire, of New Haven, connecticut. Both counsel were members of the same Connecticut law firm of Jacobs, Jacobs, Grudberg and Clifford. During said trial, co-defendant Grasso consistently requested of his attorney the opportunity to testify. It was his desire to testify, among other things, to the fact that Defendant Tropiano "never threatened Mr. Caron or anyone else at any time." The substance of this testimony was made known to Grasso's trial attorney repeatedly prior to and during trial. The sole cause of Grasso's failure to testify was his attorney instructing him not to do so.

Your movant was not aware of these facts until subsequent to conviction. He is unaware as to:

1. Whether Grasso's desire to testify was made known to movant's attorney;
2. If so, why Grasso was not allowed to present said evidence tending to exonerate this defendant.

Under the circumstances, it is respectfully submitted that Defendant Tropiano is entitled to the instant judgment and sentence being vacated and accordingly respectfully requests that:

1. An evidentiary hearing be held affording your movant an opportunity to present evidence in support of the allegations herein contained, including but not limited to testimony of co-defendant Grasso.
2. That the instant judgment and sentence be set aside.
3. For such other and further relief as this Court may deem just and proper in the premises.

By his attorneys:
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MEMORANDUM OF DECISION ON MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. § 2255 (1964)

QUESTIONS PRESENTED

Petitioner Tropiano's motion to vacate sentence, pursuant to 28 U.S.C. § 2255 (1964), presents the questions (1) whether the refusal of counsel for co-defendant Grasso

to permit Grasso to testify at the trial (assuming arguendo the truth of such allegation) *denied Tropiano* his Sixth Amendment right to counsel and his Fifth Amendment right to due process; and (2) whether such testimony by Grasso in any event qualifies as newly discovered evidence.

For the reasons stated below, the Court holds that both questions must be answered in the negative. Accordingly, the motion to vacate sentence is denied without a hearing on the ground that "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255 (1964).

PRIOR PROCEEDINGS

Tropiano was convicted by a jury on November 15, 1968, after an 18 day trial, of extortion by the wrongful use of threatened force, violence and fear, in violation of the Hobbs Anti-Racketeering Act, 18 U.S.C. § 1951 (1964), and of conspiracy to do so. He was sentenced on December 9, 1968 to concurrent 12 year terms of imprisonment and was ordered to pay a $10,000 committed fine within 30 days. The fine has not been paid, despite the elapse of more than two years and of course there has been no claim of inability to pay the fine.

The judgment of conviction was affirmed by the Court of Appeals for this Circuit on November 29, 1969, 418 F.2d 1069 (SRW, PRH, *JRB*). Certiorari was denied on April 6, 1970, 397 U.S. 1021. This Court on July 29, 1970 denied petitioner's motion to reduce sentence. For other opinions by the District Court with respect to prior proceedings, see 284 F. Supp. 477, 479-82; 296 F. Supp. 280; 296 F. Supp. 284.

FACTS

The essential facts alleged in petitioner's motion to vacate sentence are either not in dispute or are taken by this Court as true for purposes of the instant motion.

They are: Petitioner was represented throughout pro-

ceedings in the District Court by retained counsel, Howard A. Jacobs, Esq. Petitioner's co-defendant Grasso was represented by retained counsel, Ira B. Grudberg, Esq. Attorneys Jacobs and Grudberg were members of the New Haven law firm of Jacobs, Jacobs, Grudberg & Clifford. During the trial, Grasso informed his attorney, Grudberg, that he wished to testify that Tropiano "never threatened Mr. Caron or anyone else at any time." Grudberg instructed Grasso not to testify and he did not take the witness stand.

OPINION

I.

It is settled in this Circuit, even where co-defendants are represented by the same attorney, that "some conflict of interest must be shown before an appellant can successfully claim that representation by an attorney also engaged by another defendant deprived him of his right to counsel." *United States* v. *Dardi*, 330 F.2d 316, 335 (2 Cir. 1964), *cert. denied*, 379 U.S. 845 (1965). See also *United States* v. *Calarco*, 424 F.2d 657, 661 (2 Cir.), *cert. denied*, 400 U.S. 824 (1970); *United States* v. *Paz-Sierra*, 367 F.2d 930, 933 (2 Cir. 1966), *cert. denied*; 386 U.S. 935 (1967); *United States* v. *Bentvena*, 319 F.2d 916, 937 (2 Cir. 1963), *cert. denied*, 375 U.S. 940 (1963).

Here petitioner's claim is not that he and co-defendant Grasso were represented by the same attorney; but, although each was represented by a separate attorney of his own choosing, since both attorneys were members of the same law firm, somehow this created a conflict of interest. The Court holds that such representation of co-defendants by separate, privately retained attorneys, each members of the same law firm, does not *ipso facto* establish a conflict of interest; nor do the moving papers *United States* v. *On Lee*, 201 F.2d 722, 723 (2 Cir. 1953), or the

record in the instant case show any prejudice whatsoever to petitioner.

First, there is no claim of incompetence on the part either of petitioner's attorney or of co-defendant Grasso's attorney, or of the law firm of which they are members. This Court has had occasion previously to take judicial notice that "the New Haven law firm of Jacobs, Jacobs, Grudberg & Clifford . . is recognized as one of the outstanding law firms in Connecticut." *United States* v. *Ursini*, 296 F. Supp. 1155, 1158 (D. Conn. 1968).

Second, the gravamen of petitioner's claim, viewed in the light most favorable to petitioner, is not directed at conduct by petitioner's own attorney; rather, it is directed at the alleged conduct of his co-defendant's attorney in advising the co-defendant not to testify. All else aside, the Sixth Amendment has nothing to do with a defendant's preference for having a co-defendant represented by counsel acceptable to defendant. And of course, assuming petitioner and his attorney did in fact desire to have the co-defendant testify, petitioner could not compel the co-defendant to testify in the teeth of the Fifth Amendment guarantee against self-incrimination.

Third, assuming petitioner's claim were directed at the conduct of his own attorney in not somehow procuring the testimony of the co-defendant (leaving aside the Fifth Amendment bar), such claim is without merit. As a matter of trial tactics, experienced trial counsel often differ as to the wisdom of calling a particular witness to the stand. *United States* v. *Garguilo*, 324 F.2d 795, 797 (2 Cir. 1965); *United States* v. *Duhart*, 269 F.2d 113 (2 Cir. 1959); *Morgan* v. *United States*, 295 F. Supp. 967, 971-2 (D. Conn. 1968).

The Court holds, upon the moving papers and upon the entire record of the case, that petitioner has shown neither a conflict of interest nor prejudice. See *Olshen* v. *McMann*,

378 F.2d 993, 994-5 (2 Cir. 1967), *cert. denied*, 389 U.S. 874 (1967), *rehearing denied*, 389 U.S. 964 (1967). Specifically, the refusal of the attorney for co-defendant Grasso to permit Grasso to testify at the trial did not deny Tropiano his Sixth Amendment right to counsel or his Fifth Amendment right to due process.

II.

Petitioner's proffered testimony by co-defendant Grasso that Tropiano "never threatened Mr. Caron or anyone else at any time", in the opinion of this Court, does not qualify as newly discovered evidence.

It is settled in this Circuit, as well as in this Court, that, before a sentence may be vacated and a new trial granted on the ground of newly discovered evidence, the following criteria must be satisfied; "(a) The evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." *cert. denied*, 345 U.S. 936 (1953). See also *United States* v. *Bradwell*, 295 F. Supp. 958, 959-60 (D. Conn. 1968), *aff'd*, 388 F.2d 619 (2 Cir. 1968), *cert. denied*, 393 U.S. 867 (1968); *United States* v. *Capaldo*, 276 F. Supp. 986, 987 (D. Conn. 1967), *aff'd*, 402 F.2d 821 (2 Cir. 1968), *cert. denied*, 394 U.S. 989 (1969).

Assuming arguendo that petitioner's proffered testimony by co-defendant Grasso satisfies criteria (a), (b) and (d) above (an assumption of questionable validity), clearly it does not satisfy criteria (c) and (e). The record in this case demonstrates conclusively that such testimony would be merely cumulative or impeaching, and would not have produced a different result.

The Court of Appeals, in affirming the convictions of Tropiano and his co-defendants, discussed in some detail the testimony of Mr. and Mrs. Caron under the headings "Contradictory Testimony" and "Sufficiency of the Evidence". *United States v. Tropiano*, 418 F.2d 1069, 1074-75 (2 Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). Among other things, the Court of Appeals noted that "The appellants did not take the stand but they did cross-examine the Carons severely"; "Upon cross-examination Caron admitted certain errors in his direct testimony . . ."; "Furthermore appellants called six witnesses who were present at the BIRCA meeting and who contradicted Caron by denying that any threats were made by Grasso or Tropiano at the meeting;" "The Carons' errors, inconsistencies and contradictions were elaborately catalogued in the appellants' summation, and the trial court instructed the jury as to the guidelines to be utilized in determining credibility, including its duty 'to appraise a witness' reaction when faced with contradictions'"; and "We find no basis to hold that the Carons' testimony was incredible as a matter of law, or that the evidence was insufficient to support the verdict." 418 F.2d, at 1074-75.

The Court holds, upon the moving papers and upon the entire record of the case, that petitioner's proffered testimony by co-defendant Grasso does not qualify as newly discovered evidence. Specifically, the proposed testimony by co-defendant Grasso that Tropiano "never threatened Mr. Caron or anyone else at any time", at best, would merely serve further to impeach the testimony of the Carons; would be cumulative of the testimony of the six witnesses called by defendants who denied that any threats were made by Tropiano or Grasso; and upon a new trial would not preclude an acquittal.

ORDER

Petitioner Tropiano's motion to vacate sentence is denied in all respects.

The foregoing constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

Dated at Bridgeport, Connecticut, this 26th day of February, 1971.

(s) WILLIAM H. TIMBERS
WILLIAM H. TIMBERS
Chief Judge